

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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CLERK U.S. DISTRICT COURT DISTRICT OF ARIZONA	
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SAVE OUR SONORAN INC., a
non-profit corporation,

Plaintiff,

v.

No. CV-02-00761-PHX-SRB

ORDER

LIEUTENANT GENERAL ROBERT
B. FLOWERS, in his official
capacity as Commander, U.S.
Army Corps of Engineers;
MARK F. SUDOL, in his
official capacity as Chief
of the Regulatory Branch of
the U.S. Army Corps of
Engineers, Los Angeles
District; and 56TH & LONE
MOUNTAIN, L.L.C.,

Defendants.

I.

The court has had under submission plaintiff's motion for preliminary injunction. We have read the motion, the federal defendants' response, 56th & Lone Mountain's response, and plaintiff's reply. We have examined the administrative record, including the Environmental Assessment prepared by the Corps of Engineers. We have heard oral argument, and we now set forth our findings and rulings under Rule 52(a), Fed. R. Civ. P.

This is an action brought by Save our Sonoran, Inc. against the Corps of Engineers and 56th & Lone Mountain, a real estate developer, seeking judicial review of the Corps'

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1 decision to issue a permit for the construction of 66 road
2 crossings and other facilities over the waters of the United
3 States. The defendant 56th & Lone Mountain intends to build
4 houses on an entire section of land encompassing about 608
5 acres in Phoenix. Although surrounded by other development,
6 the section is desert, with washes running from east to west
7 throughout the entire parcel. To service houses on the narrow
8 sections of land that are surrounded by washes, the developer
9 plans to fill the washes at 66 separate spots for road
10 crossings. The maps that are a part of the administrative
11 record show that the areas of crossing are scattered
12 throughout the whole section. See, e.g., the map entitled
13 "404 Impact Area Map." Thus, while the waters of the United
14 States constitute about 5% of the total area, the washes are
15 a dominant feature of the land and no development of the
16 property could occur without affecting the washes.

17 On May 7, 2002, Judge Bolton (to whom this case is
18 assigned) granted a temporary restraining order enjoining the
19 defendants from engaging in any activities authorized by the
20 permit in the washes and the immediately adjacent areas.
21 Plaintiff now seeks a preliminary injunction pending the
22 ultimate resolution of its claims on the merits.

23 II.

24 One seeking a preliminary injunction must show either (1)
25 a likelihood of success on the merits and the possibility of
26 irreparable injury, or (2) the existence of serious questions
27 on the merits and the balance of hardships tips in favor of
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1 the moving party. *Andrieu v. Ashcroft*, 253 F.3d 477 (9th Cir.
2 2001).

3 A single issue dominates the merits of the claims and the
4 defenses. Plaintiff claims that the Corps of Engineers'
5 Environmental Assessment was too narrow in scope. The Corps
6 looked simply at the washes and not the remainder of the
7 section and found that there was no significant impact under
8 the National Environmental Policy Act. The plaintiff, on the
9 other hand, argues that the Corps of Engineers should have
10 looked at the environmental impact of the project on the
11 entire section and not just the washes because the washes are
12 riddled throughout the section. The plaintiff also relies on
13 the fact that the development of the site is dependant upon
14 the issuance of the permit.

15 The scope of analysis of federal action by the Corps of
16 Engineers under the National Environmental Policy Act of 1969,
17 42 U.S.C. § 4321 et seq. (West 1994 & Supp. 2001), is a topic
18 not without controversy. See generally, Timothy J. Hagerty,
19 *Beyond 404: Corps Permitting and the National Environmental*
20 *Policy Act* SF92 ALI-ABA 95 (2001), and David Paget, *NEPA'S*
21 *"Small Handle" problem: The Scope of Analysis of Federal*
22 *Action*, SG026 ALI-ABA 95 (2001). Indeed, in this very case,
23 the United States Department of the Interior disagreed with
24 the Corps' definition of its scope of analysis and thought the
25 scope should extend to the entire section. Environmental
26 Assessment at 17.

1 In *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d
2 394 (9th Cir. 1989), the court upheld the Corps of Engineers'
3 regulations relating to the scope of its analysis. In that
4 case, a developer planned a ski resort and a golf course. The
5 golf course was planned on a meadow which contained pockets of
6 wetlands. The Corps limited its environmental assessment to
7 the wetlands and not the entire resort. The court upheld this
8 limited scope of analysis because the golf course and the
9 resort were not joined to each other like two links of a
10 single chain. The court noted that both the golf course and
11 the resort could exist without the other.

12 Similarly, in *Wetlands Action Network v. U.S. Army Corps*
13 *of Engineers*, 222 F.3d 1105 (9th Cir. 2000), the court upheld
14 the Corps of Engineers' decision to limit its environmental
15 assessment to the wetland portion of a major development. The
16 court noted that the wetland portion of the proposed
17 development was relatively small and that the project could
18 proceed without the permit. 222 F.3d at 1117. The court
19 acknowledged that deciding whether federal and non-federal
20 activity are sufficiently interrelated to constitute federal
21 action for NEPA purposes is a very fact-specific question. *Id.*
22 at 1116.

23 Here, the facts appear to be more like those in *Stewart*
24 *v. Potts*, 996 F.Supp. 668 (S.D. Tex. 1998), than in either
25 *Sylvester* or *Wetlands Action Network*. In *Stewart v. Potts*,
26 the wetlands were not in a separate area, but were "scattered
27 throughout the 200-acre tract." 996 F.Supp. at 682. The
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1 court noted that in all of the cases in which the Corps'
2 jurisdictional disclaimers were upheld, the federal portion
3 and the non-federal portion were "physically, functionally,
4 and logically separable." *Id.* at 682. The court concluded
5 that because of the interdependence, the scope of analysis
6 should have included the entire project. *Id.* at 682-83.

7 Here, the Corps' Environmental Assessment acknowledges
8 that "a no-action alternative (i.e., no Corps' permit issued)
9 would not allow the site to be developed in a manner that
10 would accomplish the applicant's project purpose."
11 Environmental Assessment at 4, ¶I E(1).

12 This case thus differs from both *Sylvester* and *Wetlands*
13 in that the uplands here are not some separate piece of
14 property but instead are interspersed throughout the section
15 surrounded by washes on every side. It would not be
16 practicable to develop the uplands without an impact on the
17 washes, or to fill in the washes without an impact on the
18 uplands. The permit authorizes 66 crossings interspersed
19 throughout the entire section. And, unlike both *Sylvester* and
20 *Wetlands*, the Corps has admitted in its Environmental
21 Assessment that if it did not issue the permit, the site could
22 not be developed in accordance with the project's purpose.

23 This case, therefore, presents a very substantial
24 question about the application of the Corps' NEPA implementing
25 regulations. Under the relevant regulations, 33 C.F.R. Part
26 325, Appendix B, Section 7(b), the Corps is considered to
27 have control and responsibility for portions of the project
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1 beyond the limits of the Corps' jurisdiction "where the
2 environmental consequences of the larger project are
3 essentially products of the Corps' permit action." Here, the
4 development of the entire section with 794 houses is directly
5 dependant upon, and the product of, the Corps' permit action.
6 Without a permit to allow for 66 separate and dispersed
7 crossings, the private project could not go forward.

8 The Corps' scope of analysis under the National
9 Environmental Policy Act, Environmental Assessment at 3 ¶
10 I(D), raises substantial questions. In subparagraph D(1), the
11 Corps discusses the crossings as though they were "merely a
12 link" in a corridor type project. But the washes run through
13 the property the way lines run through graph paper. This is
14 not just a pipeline or roadway to a private project. Here,
15 the washes and the land are part and parcel of the same
16 project.

17 With respect to subparagraph D(2), the Corps limited its
18 review to the area immediately adjacent to the crossings. Yet
19 the location of all of the uplands and all of the washes
20 dictate where construction will be. The project as a whole
21 will dictate the location and configuration of the crossings.
22 See, e.g., the map entitled "Lone Mountain Property Open
23 Space."

24 With respect to subparagraph D(3), the Corps noted that
25 only 5% of the site, 31.3 acres of the 608 acres, are
26 jurisdictional waters of the United States. That would be far
27 more significant if the 5% were separated from the rest of the
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1 site. But that 5% runs through the entire 608 acres the way
2 capillaries run through tissue. It is difficult to deal with
3 tissue without dealing with capillaries and difficult to deal
4 with capillaries without dealing with tissue. So too here.

5 With respect to subparagraph D(4), the Corps noted that
6 cumulative federal control and responsibility are limited. In
7 one sense this is true. It is private property. In another
8 sense, however, this is private property with strands of
9 public waters running throughout it. Because of its duty to
10 protect the waters of the United States, federal control of
11 this entire section could be extensive.

12 Under these circumstances, we find and conclude that
13 there are serious questions on the merits in this case, even
14 under the Administrative Procedure Act's deferential arbitrary
15 and capricious standard of review.

16 All that remains, therefore, is an analysis of the
17 balance of hardships. The hardship that would be caused to
18 the defendant 56th & Lone Mountain, if enjoined, is delay in
19 connection with its real estate development. Thus, if
20 wrongfully restrained, the defendant may suffer financial
21 harm. We see no hardship caused the federal defendants. The
22 hardship that would be caused the plaintiff if the injunction
23 does not issue is the immediate development of the property
24 without an environmental assessment based upon the entire
25 project. An expanded assessment might have a dramatic impact
26 on the nature of the development and its effect on the waters
27 of the United States and the animal and plant life next to
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1 them. While we do not need to evaluate the likelihood of
2 success on the merits (the existence of serious questions is
3 adequate), we do note the possibility of irreparable injury.
4 If this desert land is disrupted, it cannot be restored. We
5 note also that some of the possible harm that might be caused
6 a wrongfully restrained defendant can be ameliorated by the
7 posting of security under Rule 65(c). In any event, we
8 conclude that the balance of hardships tips in favor of the
9 party seeking injunctive relief.

10 III.

11 IT IS THEREFORE ORDERED GRANTING plaintiff's motion for
12 preliminary injunction as follows:

13 1. Army Corps of Engineers permit number 2000-01928-RWF
14 is hereby temporarily suspended.


15 2. The federal defendants and the defendant 56th & Lone
16 Mountain, their officers, agents, servants, employees, and
17 attorneys, and those persons in active concert or
18 participation with them who receive actual notice of this
19 order, are hereby preliminarily enjoined from any activities
20 that are within the scope of Army Corps of Engineer permit
21 number 2000-01928-RWF anywhere in section 16, known as Lone
22 Mountain, in Phoenix, Arizona.

23 3. Not later than 15 days after the date of this
24 injunction, the plaintiff shall post security under Rule
25 65(c), Fed. R. Civ. P., by way of bond or cash in the amount
26 of \$50,000.00 for the payment of such costs and damages as may
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1 be incurred or suffered by the defendants in the event they
2 are ultimately found to have been wrongfully enjoined.

3 4. In light of the above, the parties are encouraged to
4 expedite the resolution of this action by filing cross-motions
5 for summary judgment. The Corps is encouraged to consider the
6 preparation of a new Environmental Assessment with a scope of
7 analysis under the National Environmental Policy Act as though
8 federal action included the entire project on all of section
9 16.

10 DATED this 30TH day of May, 2002.

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14 Frederick J. Martone
15 United States District Judge
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